

No. 15090

In the United States Court of Appeals
for the Ninth Circuit

SAMUEL J. CHASE AND JEANNETTE S. CHASE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Tax Court is reported at 25 T.C. No. 50. (R. 41-52.)

JURISDICTION

This petition for review (R. 55-59) involves federal income taxes for the taxable year 1952. On November 29, 1954, the Commissioner of Internal Revenue mailed notices of deficiency to the taxpayer Samuel J. Chase in the total amount of \$2,155.78 (R. 14-15) and to the taxpayer Jeannette S. Chase in the total amount of \$2,014.40.¹ Within ninety days thereafter and on Feb-

¹ The petition for review filed by Jeannette S. Chase and the Commissioner's answers thereto are omitted from the record by stipulation (R. 63) since they are substantially identical to the petition for review filed by Samuel J. Chase and the Commissioner's answers thereto except for immaterial differences in amounts of tax.

ruary 1, 1955, the taxpayers filed petitions with the Tax Court for redeterminations of the deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 7-19.) The decisions of the Tax Court were entered January 3, 1956. (R. 52-55.) The case is brought to this Court by a petition for review filed March 6, 1956. (R. 55-59.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court was correct in holding that Section 107(a) of the Internal Revenue Code of 1939 did not apply to executor's commissions received in 1952 for extraordinary services rendered an estate in litigation to determine the assets of the estate where other commissions were received in 1950 for ordinary services rendered and in 1953 for extraordinary services in connection with a different litigation and the amount received in 1952 was less than 80 per cent of the total amounts received in 1950, 1952 and 1953.

STATUTES INVOLVED

Internal Revenue Code of 1939:

[as added by Sec. 220(a), Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 107 as amended by Sec. 139(a), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 119(b), Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

(a) *Personal Services*.—If at least 80 per centum of the total compensation for personal serv-

ices covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual.

* * * * *

(26 U.S.C. 1952 ed., Sec. 107.)

Deering's Probate Code of California:

Sec. 571. *Duties of executor, etc.: Surviving partner.* The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. * * *

Sec. 900. *Expenses and compensation of executor, etc.* The executor or administrator shall be allowed all necessary expenses in the care, management and settlement of the estate, and, for his services, the compensation hereinafter provided; but when the decedent, by his will, makes other provision for the compensation of the executor, that shall be a full compensation for his services, unless by written instrument, filed in the court, he renounces all claim for compensation provided for in the will.

Sec. 901. *Commissions.* The executor, when no compensation is provided by the will or he re-

nounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent. If there are two or more executors or administrators, the compensation shall be apportioned among them by the court according to the services actually rendered by each. * * *

Sec. 902. *Allowances for extraordinary services, etc.: Employment of tax counsel, tax auditors, etc.* Such further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as sales or mortgages of real or personal property, contested or litigated claims against the estate, the preparation of estate, inheritance, income, sales or other tax returns, or the adjustment or litigation or payment of any of said taxes, litigation in regard to the property of the estate, the carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform.

The executor or administrator may also employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action which such persons, respectively, may lawfully perform in the computation, reporting, or

making of tax returns, or in negotiations or litigation which may be necessary for the final determination and payment of taxes, and pay from the funds of the estate for such services. * * *

STATEMENT

The Tax Court found the facts to be as stipulated between the parties (R. 42-52) and these facts may be summarized as follows:

This case involves income taxes for the year 1952. The taxpayers, husband and wife, residing in California, filed separate returns for that year. (R. 44.) The issue presented is whether the taxpayers are entitled to apply the provisions of Section 107(a) of the Internal Revenue Code of 1939² to payments of \$22,500 received by the taxpayer husband,³ Samuel J. Chase, in 1952 for services rendered an estate of which he was co-executor.

The decedent, George L. Leiter, died in 1947. Shortly before his death he and his wife, Ida, signed a contract in the form of a joint will which provided that all of their property, regardless of how it was held or its nature when acquired, "shall be deemed to be community property." At that time the property had an approximate value of \$350,000 of which about \$293,500 worth was property held in joint tenancy or otherwise apparently payable to the survivor, including joint bank accounts, annuities, United States Savings Bonds (Series G) and real estate. By the decedent's will the taxpayer and the decedent's daughter, Burdeitta L.

² References to "Code" or Internal Revenue Code refer to Internal Revenue Code of 1939.

³ References hereafter to the "taxpayer" refer to the taxpayer husband, Samuel J. Chase.

Forrest, were named executors and testamentary trustees and were appointed as such executors by the proper California court on February 11, 1947. (R. 44.)

After the decedent's death, his wife, Ida, as survivor, claimed the properties held in joint tenancy or otherwise apparently payable to the survivor while the taxpayer contended that since the joint contract converted all of the property of decedent and his wife into community property, the executors were entitled to possession of all the property. (R. 45.)

Since the dispute could not be settled amicably and a ruling on the matter could not be obtained from the Probate Court, on September 3, 1947, the taxpayer, as executor, filed an action for a declaratory judgment and to quiet title. The taxpayer, as executor, was represented by counsel in this action. (R. 45.) The judgment of the trial court, in 1949, gave substantial support to Ida's contentions. However, in 1950, upon appeal, the position of the executor was fully recognized and upheld. (R. 46.)

Thereafter, a petition for compensation for extraordinary services rendered by the taxpayer in connection with the above litigation was filed and various hearings were held which resulted in the filing of an amended petition. After several hearings on the amended petition, the Court signed an order finding that the taxpayer performed extraordinary services and was entitled to extra compensation therefor out of the estate in the amount of \$22,500. This amount was paid on May 28, 1952. (R. 48.)

The services rendered by the taxpayer in connection with the litigation and the petition for compensation for extraordinary services were personal services and

said services embraced the following, among other things: endeavors to resolve the controversy through negotiations with Ida and Burdeitta L. Forrest, Probate Court procedures, correspondence with the Treasury Department; the filing of suit; conference with attorneys and opposing counsel; selection of counsel; preparation for trial, appearance as a witness in the trial; review of briefs, pleadings and court decisions; appeal from the trial court's decision; review of appellate briefs and appellate court's decisions; conferences with his attorney in connection with proceedings for extra compensation for extraordinary services rendered in connection with the case; review of petition for compensation, data and briefs; conferences with witnesses; appearance as witness at the trial of petition for compensation for extraordinary services rendered in the case. (R. 48.)

An important tax matter arose in 1950 in connection with federal income taxes of decedent and his wife Ida for the years 1941 to 1946. The revenue agent proposed additional taxes which with interest would have amounted to over \$200,000. The matter was settled by the payment of approximately \$46,000. Substantial services were also rendered the estate by the taxpayer in connection with the refund of federal estate taxes, with state inheritance and income taxes and with petitions of partial distribution. A petition for allowances for extraordinary services in connection with these tax matters and partial distributions was filed by the taxpayer, and after due hearing, the Court, on November 12, 1953, ordered payment to the taxpayer of \$20,000 on account of such extraordinary services. (R. 39, 49.)

On October 10, 1950, the Probate Court ordered pay-

ment to the taxpayer, on account of executor's statutory fees, the sum of \$2,200. (R. 49.)

The \$22,500 compensation received by the taxpayer in the taxable year 1952 was less than 80 per cent of the total compensation received by him for his personal services as executor of the estate. (R. 47, 50-51.)

Although the situation faced by the taxpayer in his efforts to take into his possession as executor all of the estate of the decedent presented unusual difficulties, his services in this regard were undertaken pursuant to his duties as such executor and were properly paid for by the estate by an allowance for extraordinary services in addition to regular percentage commissions provided by statute. All of his services compensated by the estate were services rendered by him as executor. (R. 50.)

The Tax Court held that Section 107(a) did not apply in this case and entered decisions for the Commissioner (R. 41-55), from which the taxpayers have appealed (R. 55-59).

SUMMARY OF ARGUMENT

As compensation for performing his duties as a co-executor of the estate of George L. Leiter, the taxpayer herein was compensated in a total amount of \$44,700. This sum was received in three separate payments: \$2,200 in 1950, representing the statutory fee allowed executors; \$22,500 in 1952, representing compensation allowed the executor for the performance of extraordinary services in litigation with the widow of the decedent; and \$20,000 in 1953 representing extraordinary services in connection with various tax matters. The question in this case is whether the \$22,500 received in 1952 may be considered as compensation for a per-

sonal service separate and distinct from the other services rendered so as to meet the requirement of Section 107 (a) of the Code that at least 80 per cent of the total compensation for personal services be received in one taxable year. The Tax Court upheld the position of the Commissioner and determined that there was only one personal service performed herein as executor and that this service could not be divided up into the various functions imposed as duties upon the executor. The ordinary run-of-the-mill activities of the executorship, as well as the extra duties arising out of either prolonged litigation or of tax complications are all part of the duties imposed by law upon the executor of an estate. The California Probate Code, Section 571, expressly requires the executor to take into his possession all the estate of the decedent. The fact that in this particular instance the taxpayer experienced unusual difficulties in complying with the provisions of the Probate Code does not provide any logical reason for considering these services as separate from any other services performed as executor. Likewise, the fact that the state law provides two methods for the determination of commissions an executor is to receive, one based upon the amount of the estate and the other providing allowances for certain extraordinary services, in nowise changes the fact that all of the services performed were of one nature. The taxpayer did not receive compensation for any services rendered the estate in a capacity other than that of executor, and all of the services which he performed were required of him as executor. The logical result of the taxpayer's argument would be to consider each extraordinary service performed as a separate and distinct undertak-

ing from the ordinary service as executor, and it is submitted that such an artificial breaking up of homogeneous services is not warranted for purposes of receiving the spread income benefits of Section 107(a) of the Code. And indeed, the courts have been zealous in refusing to allow such artificial separations of single personal services. Accordingly, it is submitted that the decisions of the Tax Court were correct and should be affirmed.

ARGUMENT

Extraordinary Services Rendered an Estate by an Executor Are Not Separate and Distinct From Other Extraordinary Services and Ordinary Services Rendered the Same Estate for Purposes of Determining Whether the Requirements of Section 107 (a) of the Internal Revenue Code of 1939 Are Met

As compensation for performing his duties as a co-executor of the estate of George L. Leiter, the taxpayer herein was compensated in a total amount of \$44,700. This sum was received in three separate payments: \$2,200 in 1950, representing the statutory fee allowed executors (R. 49); \$22,500 in 1952, representing compensation allowed the executor for the performance of extraordinary services in litigation with the widow of the decedent in the case of *Chase v. Leiter* (R. 47); and \$20,000 in 1953 representing extraordinary services in connection with various tax matters (R. 49). The question for determination in this case is whether the \$22,500 received in 1952 may be considered as compensation for a personal service separate and distinct from the other services rendered so as to meet the requirement of Section 107 (a) of the Code, *supra*, that at least 80 per cent of the total compensation for personal services be received in one taxable year. So contends

the taxpayer. It is the position of the Commissioner, however, that this payment can be considered only in conjunction with those received in 1950 and 1953, in which instance Section 107 (a) would not apply. The Tax Court affirmed the deficiency determinations of the Commissioner and held that there was only one personal service herein, the services performed as an executor, and that this service could not be divided up into the various functions that are imposed as duties upon the executor. In this respect the court stated (R. 50):

Although the situation faced by Chase in his efforts to take into his possession as executor all of the estate of the decedent presented unusual difficulties, his services in this regard were undertaken pursuant to his duties as such executor, and were properly paid for by the estate by an allowance to "be made as the Court may deem just and reasonable for * * * extraordinary services, such as * * * litigation in regard to the property of the estate * * *" in addition to regular percentage commissions provided by statute. All of his services compensated by the estate were services rendered by him as executor. In our opinion no part of these services can be treated separately with regard to the application of Section 107(a), * * * even though compensated for as "extraordinary services," * * *.

Thus the "personal services" rendered by this taxpayer to the estate consisted of *all* of the services which he was required to perform as executor of the estate. The ordinary run-of-the-mill activities of the executorship and the extra duties arising out of either prolonged liti-

gation or of tax complications are all part of the duties imposed by law upon the executor of an estate.

The California Probate Code, Section 571, *supra*, provides that:

The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. * * *

It can be seen that as part of his job as executor, the taxpayer was required by law to take into the estate all of the assets of the decedent. If the circumstances had been different and there had been no litigation concerning these assets, it is clear that the taxpayer would not be contending that the collection of assets constituted a service distinct from the other services performed as executor. And indeed, in logic there is no reason why such services should be severed from the other services of the executor merely because in this particular instance the taxpayer experienced unusual difficulties in bringing the assets into the estate.

Provision for the compensation of executors is made in Sections 901 and 902 of the California Probate Code, *supra*. Section 901 sets up a statutory fee based upon the amount of the estate. Section 902 makes provision for those instances where it is necessary for the executor to perform certain extraordinary services—

such as sales or mortgages of real or personal property, *contested or litigated claims against the estate, the preparation of estate, inheritance, income, sales or other tax returns, or the adjustment or litigation or payment of any of said taxes, litigation in regard to the property of the estate, the*

carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform. (Italics supplied.)

However, the mere fact that the State of California provides two methods for the determination of the commissions an executor is to receive for his services in nowise changes the fact that all of the services performed are of one nature—all were performed pursuant to the taxpayer's duties as an executor. The taxpayer did not receive compensation for any services rendered the estate in a capacity other than that of executor, and all of the services which he performed were those required of him as an executor.

The position of the taxpayer appears to be that because the extraordinary services in connection with the *Chase v. Leiter* litigation were compensated for separately, and because the compensation order of the Probate Court referred specifically to this particular litigation, they may be completely severed from all other duties the taxpayer performed as executor for the purposes of Section 107(a). If the taxpayer's argument is accepted an extension of the situation at bar would mean that if an executor could show that he satisfied the 36-month requirement of Section 107(a) it would then be possible for him to consider separately each service for which extraordinary compensation is allowed, such as each and every sale or mortgage of real or personal property, each separate tax problem, every different claim against the estate, *ad infinitum*. Basically, what the taxpayer's argument boils down to is an assertion that each and every extraordinary serv-

ice must be considered separately from every other extraordinary service and from the ordinary duties of an executor. It is submitted that all of these services for which extraordinary compensation is allowed are merely segments of one service, the service performed by an executor for an estate, and they cannot be broken down in an artificial manner as desired by the taxpayer for purposes of receiving the spread income benefits of Section 107(a) of the Code.

The Commissioner's position, as affirmed by the Tax Court, is well supported by the courts. In the case of *Lesser v. Commissioner*, 17 T.C. 1479, the taxpayer was a California executor who received commissions for extraordinary services performed by acting as tax counsel for the estate as allowed by Section 902 of the Probate Code. The argument was made, as in the case at bar, that the services as tax counsel must be considered as separate from other services performed as executor. The Tax Court refused to accept this argument, stating (p. 1483):

We can not find that petitioner undertook a special task which is separate and distinct from all others he performed as a co-executor. The mere filing of a petition for additional compensation does not make his work a special task. *Alfred J. Loew*, 17 T. C. 1347. What is obvious to us is that petitioner as a co-executor not only performed the ordinary and routine duties required of an executor but also successfully accomplished the difficult and the more complicated tasks which a less capable executor might relegate to others. Regular commissions allowable under section 901 are taken into account by the courts of California when fixing

extraordinary commissions under section 902, which recognizes performance of only one service under a single appointment. *In re Pomin's Estate*, 92 P. 2d 479.

Another California executor, in *Kauffman v. Westover*, 111 F. Supp. 752 (S. D. Calif.), was denied the right to apply the provisions of Section 107(a) of the Code to one fee received for extraordinary services, when other sums were received in various other accountings. The court held that a period of services under Section 107(a) might not be carved out of the total period for performance of the services by the simple expedient of rendering an account covering an aliquot period. See also *Norcross v. United States*, 114 F. Supp. 51 (N.J.), affirmed *per curiam*, 222 F. 2d 209 (C.A. 3d); *Loew v. Commissioner*, 17 T.C. 1347, affirmed *per curiam* 201 F. 2d 368 (C.A. 2d).

The same reasoning which persuaded the courts in the above ~~two~~ cases surely applies in this case at hand. Had the executor desired to wait, compensation for all services might have been made at once. The fact that payments were made at intervals does not change the basic nature of the services in any way so as to allow the severing which the taxpayer requests. And it might be argued that there is more reason for separating services performed as tax counsel for an estate from the other duties of an executorship, the situation in the *Lesser* case, *supra*, than in separating the services with which we are here concerned. In the *Lesser* case the taxpayer executor could have hired someone else to act as tax counsel for the estate; in this case clearly the taxpayer executor could not have relegated his duties as executor to someone else.

The services performed by the taxpayer herein were unitary, continuous and homogeneous, and as such they may not be broken up for the purpose of the application of Section 107(a) of the Code. The courts have been zealous in refusing to allow artificial breakdowns of such homogeneous services. An attempt to apply the section to commissions received by a trustee in an intermediate accounting was denied, *Civiletti v. Commissioner*, 152 F. 2d 332 (C.A. 2d), certiorari denied, 327 U.S. 804; *Lum v. Commissioner*, 12 T. C. 375. Where commissions of two types were received, one computed on the corpus of a trust and to be paid out of principal and the other based on income collected, the taxpayer has not been allowed to separate the services on the ground that they were too related to be disentangled. *Smart v. Commissioner*, 152 F. 2d 333 (C.A. 2d), certiorari denied, 327 U.S. 804; *Warren v. Commissioner*, 20 T. C. 378.

The fact that the taxpayer, in the performance of his duties, has become involved in litigation in no wise affects the nature of the services rendered, despite the contention of the taxpayer to the contrary. (Br. 9.) In fact, it is contemplated that in the performance of his duties an executor might become embroiled in litigation and Section 902 of the California Probate Code makes express provision for compensation should such an event arise.

The cases of *Terrell v. Commissioner*, 14 T. C. 572, and *Estate of Pierce v. Commissioner*, 24 T. C. 95, strongly relied upon by the taxpayer, present factual situations much dissimilar to the instant case. Terrell's services to a corporation in connection with a patent controversy were completely separate from his

duties as an officer of the corporation. Pierce's duties as general counsel for the Missouri Pacific Railroad were separate from services he rendered the railroad as a court-appointed attorney for the railroad in a reorganization under Section 77 of the Bankruptcy Act. However, in the present case, all of the services performed were the result of one service under a single appointment. The taxpayer performed no services which were not required of him as an executor, and all payments that were received came from the estate as the result of this single employment. The mere fact that the services performed required more time and effort than the normal services performed as an executor is not reason enough for considering such services as separate and distinct and the Tax Court rightly refused to allow such a separation. Accordingly, the spread-income benefits of Section 107 (a) of the Code are not here applicable.

CONCLUSION

For the foregoing reasons, it is submitted that the decisions of the Tax Court were correct and should be affirmed.

Respectfully submitted,

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